No. 503.

Motion to advance

Filed Jan. 20, 1902.

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JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
LEE YEN TAI. } No. 503.

UPON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE.

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This Chinese person, claiming to be a merchant, was found to be a laborer and was ordered to be deported by a United States commissioner in the northern district of New York. While the United States marshal was proceeding to execute the order of deportation, the Chinaman was taken from his custody under a writ of *habeas corpus* issued by the United States district judge for the southern district of New York. Judge Brown discharged the Chinaman, and pending appeal by the United States admitted him to bail in the sum of $300.

These facts in more detail, leading up to the question certified, appear in the certificate.

The grounds of the application for *habeas corpus* were the assertions that the petitioner is not a laborer nor subject to the exclusion laws; that the commissioner was without jurisdiction to deport, especially in

view of the treaty of 1894; that under that treaty, which nullified the exclusion laws, the courts have no authority to deport a Chinese person.

The appeal of the United States embraced a motion to vacate the order admitting to bail, on the ground that the laws clearly forbade the admission to bail of a Chinese person held under an order of deportation, and that the power of the district court, after allowance of appeal, was restricted to the grant of a stay, and that the Chinaman, therefore, should have been returned into the custody of the marshal pending appeal

Various related questions of jurisdiction and on the merits under the treaty and laws were argued in the circuit court of appeals, resulting in the certification by that court of the single question now submitted here. In the meantime, the circuit court of appeals has taken no action on the question of admission to bail.

The Solicitor-General respectfully moves that this cause be advanced and assigned for argument at an early day, for the following reasons:

1. The question is fundamental and goes to the validity of most of the existing Chinese exclusion laws. To deny their validity is a startling proposition. The Government believes it to be manifestly untenable. Whether or not well-founded, the doubt should be resolved promptly, in order that the laws may be rightly understood and enforced.

2. Numerous appeals to this court by Chinamen, in some of which the merchant status is claimed and in

others the right of native-born citizens, are dependent in principle upon the question submitted in this case. Such appeals are constantly coming forward. The present indications are that the court will be unduly burdened by them if the issue is not soon brought to hearing and disposed of. There is no reason apparent why appeals will not be taken in all cases hereafter in which a Chinaman is ordered to be deported; and most of them involve the admission to bail allowed while the order of deportation is in process of execution. This, the Government submits, is contrary to the purpose and meaning of the law, and obviously encourages frivolous appeals. The question of bail will be raised by the Government at an early opportunity, but does not seem to be properly before the court in this case. Due motion on that point will be made in other pending cases, which are typical of the entire controversy, and in which, also, the Government will move to advance for hearing on the merits with the present case. If such appeals by Chinamen and the *habeas corpus* applications from which they flow are an unwarranted perversion of legal procedure, in view of the well-established doctrines and rules governing the Chinese exclusion laws and proceedings thereunder, as the Government strongly contends, or, if it be true, on the other hand, that the Chinamen have such rights as are claimed, it is most important that the controversy be set at rest at the earliest practicable date.

It is respectfully submitted that the question under this certificate should be advanced for hearing at as

early a day as may consist with the convenience of the court. I am authorized to say that counsel on the other side agree that the cause should be advanced.

Since this motion was prepared we are advised that the circuit court of appeals on the 15th instant handed down its opinion in the case, which is printed as an appendix hereto. It will be observed that no definite action was taken upon the motion to vacate the order admitting to bail, that court in effect committing the whole case to this court under their conclusion to reserve judgment and certify the question sent here. We therefore submit to the court the additional point whether it will not be proper for the court of its own motion to cause the entire record in the court below to be certified to this court for consideration, in connection with this and other similar cases, on the merits, and in respect to the point regarding bail.

JOHN K. RICHARDS,
Solicitor-General.
HENRY M. HOYT,
Assistant Attorney-General.

APPENDIX.

United States circuit court of appeals, second circuit.

THE UNITED STATES, APPELLANT,
v.
LEE YEN TAI, APPELLEE.

WALLACE, Circuit Judge:

This is an appeal from an order in habeas corpus made by the United States district court for the southern district of New York, discharging Lee Yen Tai from the custody of the marshal for the northern district of New York.

The writ issued upon the petition of Lee Wah, a brother of Lee Yan Tai, setting forth in substance that Lee Yen Tai, being lawfully entitled to be and remain in the United States, pursuant to the Constitution and the laws thereof and the treaty with China promulgated in 1894, was imprisoned and held in restraint by the marshal by color of a warrant for his deportation issued by a United States commissioner for the northern district of New York without jurisdiction. The return of the marshal set forth the warrant. The warrant recited in substance that the petitioner was arrested and brought before the commissioner on the charge of being a Chinese laborer seeking to enter the United States without producing the certificate prescribed by law and not entitled to be or remain within the United States, and thereafter upon a hearing and trial was found guilty of the charge, whereupon the commissioner adjudged that

he be immediately removed to the Empire of China by the United States marshal for said district.

Upon the hearing in the district court no evidence was introduced, and the case was decided upon the facts set forth in the petition and the return. As no opinion was written by the district judge, it may be inferred that the decision proceeded upon the ground that the treaty of 1894 between the United States and China operated as a repeal of the preexisting statutes providing for the deportation of Chinese citizens unlawfully within the United States.

The assignments of error assume that the decision proceeded upon this ground, and challenge the construction placed by the court upon the treaty. If the appeal presented no other question than the correctness of this ruling, this court would be without jurisdiction to entertain it. The circuit court of appeals has no jurisdiction in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty is drawn in question. In such cases an appeal or writ of error lies directly to the Supreme Court, and the circuit court of appeals can only exercise appellate jurisdiction in cases other than those. Authority, however, is given the circuit court of appeals in every "subject within its appellate jurisdiction" to certify to the Supreme Court any question of law concerning which it desires the instruction of that court "for its proper decision." (Act of March 3, 1891, section 6.) The Supreme Court in several cases has held that although a case which has been brought to the circuit court of appeals by an appeal or writ of error may involve a question which that court has no jurisdiction to entertain, it may nevertheless, if the case also involves other questions, determine those ques-

tions and certify to the Supreme Court the question which it may not entertain. *United States* v. *Jahn* (155 U. S., 109); *Carter* v. *Roberts* (177 U. S., 496). In the latter case the court used this language: "When cases arise which are controlled by the construction or application of the Constitution of the United States a direct appeal lies to this court, and if such cases are carried to the circuit court of appeals those courts may decline to take jurisdiction, or where such construction or application are involved with other questions may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance." This language is relied upon by counsel for the appellant as meaning that the circuit court of appeals may, in deciding the whole case, decide the constitutional question, or, as in this case, a question involving the construction of a treaty. We do not regard it as intended to bear that meaning, and as we read the language it means simply that the circuit court of appeals may decide the whole case by affirming or reversing the decision under review without passing upon the constitutional or treaty question, or, if it sees fit, may reserve judgment and certify that question.

Passing to the questions which this court has power to determine, they may be summarily disposed of. The only assignments of error other than those respecting the construction of the treaty are that the court erred in discharging the defendant, that it erred in not ordering him back into the custody of the marshal, and that it erred in not dismissing the writ. The assignments do not comply with the rule, as they do not set out particularly the error intended to be urged. The court is at liberty, however, to notice a "plain error

not assigned." The more important of the errors which have been urged allege defects of form in the petition which might have been cured by an amendment if they had been taken in the court below. They do not appear to have been taken there, and can not be raised for the first time upon appeal.

There certainly is no "plain error" in the case to justify a consideration of questions not presented by the assignments. Except for the importance of the decision of the court below in its bearing upon other cases which may arise under the Chinese exclusion laws, we should consider it to be our duty to affirm the order of the court below, without certifying any question for instructions to the Supreme Court; but it is so desirable in the public interests that the error of construction, if there was one, be corrected promptly, that we have concluded to reserve judgment and certify the question for instructions.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

CHIN BAK KAN, APPELLANT,
v.
THE UNITED STATES. } No. 525.

CHIN YING, APPELLANT,
v.
THE UNITED STATES. } No. 526.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The Solicitor-General respectfully moves the court to advance these cases for hearing at an early day along with the case of Lee Yen Tai, in which a motion to advance has recently been made. This motion is made for the same reasons respecting the importance of the issue and the desirability of prompt hearing and determination, in order that the laws may be rightly understood and enforced, as were given on that motion. The present cases may aptly be heard with the Lee Yen Tai certificate as one case, so far as the argument is concerned. The hearing on the associated records will fully present the controversies now raised in many

cases constantly coming to the court, and thus will economize the time and labor of the court.

Notice of this motion has been served on counsel for the appellants.

JOHN K. RICHARDS,
Solicitor-General.
HENRY M. HOYT,
Assistant Attorney-General.

No. 525 & 526

Supreme Court U.S.
FILED
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JAMES H. MCKENNEY
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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

CHIN BAK KAN, APPELLANT,
v.
THE UNITED STATES. } No. 525.

CHIN YING, APPELLANT,
v.
THE UNITED STATES. } No. 526.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

MOTION ON BEHALF OF THE UNITED STATES TO VACATE ORDER ADMITTING TO BAIL, AND BRIEF THEREON.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

CHIN BAK KAN, APPELLANT, v. THE UNITED STATES. } No. 525.

CHIN YING, APPELLANT, v. THE UNITED STATES. } No. 526.

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

MOTION ON BEHALF OF THE UNITED STATES TO VACATE ORDER ADMITTING TO BAIL, AND BRIEF THEREON.

These are cases of Chinese persons who claim to be native-born citizens of the United States and therefore entitled to be and remain in this country, but who were adjudged by a United States commissioner and by the United States district court, on appeal, in the northern district of New York, not to have established their claims, and were therefore ordered to be deported as alien Chinese laborers (Rec., No. —, p. —; No. —, p. —). These appeals followed and thereupon, by order of Mr. Justice Peckham, dated October 1, 1901, the orders of deportation were stayed, the appeals operating as *supersedeas*, and the Chinamen were admitted to bail, pending further proceedings, in the sum of $500 each (No. —, p. —; No. —, p. —). Bail was then entered in each case to abide the result of appeal,

and the Chinamen were set at liberty. The present cases, it will be observed, present a claim of citizenship; the Government understands that cases, otherwise identical in general character, which for whatever reason have not yet been brought forward by opposing counsel herein, present the merchant claim.

These cases are typical of a large number of cases now in or on the way to this court. In some the transcripts have been received but not filed; in some the time for filing has been enlarged; in some bail has been refused by the lower courts pending determination of the question by this court. Excepting these two cases, which have been docketed, and in which the records have been printed in order that this preliminary question may be determined, none of these cases has been docketed by appellants.

These are the facts. We do not entertain and do not mean to suggest any prejudicial inference.

remanded to the custody of the marshal pending appeal. This motion is based upon the following points submitted in argument:

I.

The prohibition of admission to bail in such cases, more explicitly referred to in paragraph II, is a necessary result of the general policy and general scheme of the laws excluding and expelling certain Chinese persons.

Existing laws exclude and expel Chinese persons not entitled by these laws to enter the United States

or remain there. The validity of these laws has been fully upheld by the court, regarding the fundamental rights of sovereignty and the power of Congress. It is idle to question here the wisdom or policy of these laws. On the merits in the present cases the astonishing proposition is advanced that the treaty of 1894 has repealed or abolished most of the existing laws—in particular has demolished the entire superstructure upon which practically all the deportation cases rest. As I understand the contention, it asserts that Chinese seeking admission are not now required to present themselves to the immigration officers at the port or frontier; that if they fail to do so and enter clandestinely, they are nevertheless entitled to remain even if laborers; that at all events there is now no authorized machinery of the law to enforce their deportation if they are found within our borders; and that the only exception is in the case of laborers who were here and were not registered under the acts of 1892 and 1893, or who, being here and being duly registered, and having left temporarily, have returned and by evasion have reentered the country without complying with the law. In short, the argument is that a Chinese person of the permitted classes without a certificate, or a Chinese laborer coming for the first time, who get into the country, no matter by what clandestine and illegal means, are entitled to remain.

This notion is so strained, so illogical, and so unsubstantial that it does not even merit the praise of being ingenious. Our argument on these points will be duly made at the hearing on the merits, but for

the purposes of this subsidiary motion we may safely proceed upon the law as it has been universally supposed to be ever since as well as before the treaty of 1894, and as this court has manifestly assumed it to be in view of the decisions.

In the case of *The United States* v. *Mrs. Gue Lim* (176 U. S., 459) the court adverts to the Government contention that under the treaty of 1894 the certificate requirements of the sixth section of the act of 1884 apply to all permitted Chinese subjects who seek to enter this country, and uses the following language:

> We do not think the treaty of 1894 alters the result flowing from the treaty of 1880 and the act of 1884. The question is whether under the act of 1884, construed in connection with the treaty of 1880, the wife of a Chinese merchant domiciled in this country may enter the United States without a certificate because she is the wife of such merchant.

The court answered that question in the affirmative for the fundamental reasons given. It is a necessary inference, however, that the court views the treaty of 1894 as generally consistent with the previous treaty and the existing laws, and not as destructive thereof. The court merely and evidently thought that the treaty of 1894 did not create a different or stricter rule in the respect presented.

The case of *Li Sing* v. *United States* (180 U. S., 486), arising in all material points since the ratification of the treaty of 1894, holds that a United States commissioner has authority to hear and determine the

question whether a Chinese person is entitled to remain within the limits of the United States. There the Chinaman contended that he was a merchant (in that case returning to this country) and the commissioner found that he was a laborer. The court speaks of the certificate required by the sixth section of the act of 1884, and does not intimate that the certificate is not now necessary because the treaty of 1894 is permissive (Article III) where the previous act was mandatory.

It may be said that the contentions now made on the appellant's behalf were not raised in these recent cases, but it is safe to reply that this court would of its own motion have interjected into those cases some reflection of the present contentions if they possessed the slightest merit

I repeat that we may safely deal with this subsidiary motion on the theory that the existing scheme is firmly founded, and reserve all discussion of the novel views on the merits, which counsel advances, for the proper time of argument.

This is the present situation: Chinese laborers coming to the country for the first time are rigidly excluded, not only by the statutes, but under the recognition by the treaty of 1894, the language of which is (Article I) that such coming of Chinese laborers "shall be absolutely prohibited." Certain returning Chinese laborers who have the right to reenter must conform to requirements which both the treaty and the statutes specify. Chinese of the permitted classes must present the certificate required by section 6 of the act of 1884, the

only modification of that statute under Article III of the present treaty being that now Chinese subjects may present the required certificate issued either by the Government of China, or by the Government where they last resided. This has been construed to mean (22 Op., 201) that if the Chinese person comes from China he must present a certificate of the Government of China; if he comes from some other country he must present the certificate of the Government of that country.

All Chinese persons to obtain legal entry must present themselves to the proper customs or immigration authorities at the port of entry, whether a seaport or customs port of entry on the land frontier. The decision of the proper executive authority upon the right of aliens to enter is final in all cases, if adverse to the alien, unless reversed by the Secretary of the Treasury on appeal. Any Chinese person who enters clandestinely is found here unlawfully, although under the new jurisdiction which then attaches—there being no provision to return such persons to the executive authorities at the frontier for their decision, or to apply that decision (if one has been made) as conclusive on the commissioner—the right to be and remain here may be investigated and determined in the judicial jurisdiction which has attached because the Chinaman is within the country. The Chinaman must establish by affirmative proof, to the satisfaction of the judicial officer, his lawful right to remain in the United States, and if he does not, he must be deported.

Under a section of an act, the validity of which in whole or in part has been questioned (section 13, act September 13, 1888), a Chinese person ordered to be deported by the inferior judicial officer (the commissioner) may appeal to the district judge, and such appeals are constantly taken (as herein) and are not resisted by the Government as unauthorized. This course by appeal (however far the appeal may legitimately be carried) is the only remedy expressly given the Chinaman, and was meant to be the exclusive remedy. This is manifestly so. Deportation proceedings are not criminal; deportation is not punishment for a crime, although general aspects of the subject may fall in with criminal analogies. So that when Congress (assuming section 13 of the act of 1888 to be in force) in its full power to deal with these matters, gave the Chinaman the limited right of appeal, they meant to give him and gave him no other privilege of review, and when he has exhausted his statutory appeal he has exhausted all his remedies. Section 12 of the act of 1884, an act undoubtedly in force, directs, or rather compels, deportation if the Chinaman is found by the justice, judge, or commissioner to be not lawfully entitled to remain in this country, and there is no provision for appeal. These statements are directed against the unwarranted use of *habeas corpus* superimposed upon appeals which have been finally determined, in cases related to and grouped with these two cases. We do not mean to argue that aspect of the merits, but merely refer to it to point out the plain confines of allowances in favor of Chinamen.

Now, just as the scheme of executive decision at the seaport or frontier is final, even when the Chinese person claims that he is entitled of right by some law or treaty to enter this country, and that the immigration officers have exceeded their jurisdiction, so in these deportation cases, which mostly arise in fraudulent claims of merchant or citizen status by Chinamen, whose clandestine entry does not strengthen the equity or pathos of their situation, the scheme manifestly is to make final the decision of the commissioner or the judge (as the case may be), at least upon the facts. It is certainly well settled as a controlling principle that in no event may the facts be reexamined nor any other questions be considered and determined than the jurisdiction of the commissioner (or judge) and the legality of his order; that is, the only questions are, Does the law authorize the commissioner to proceed, and does the law empower him to enter his order? We understand that opposing counsel concede the correctness of this doctrine and its applicability to the present issue on the merits. Such seems to have been their position at the hearing of the Lee Yen Tai case in the circuit court of appeals.

We have stated, perhaps at wearisome length, what we believe to be the true conception of the law and procedure on Chinese exclusion and deportation. The Government, under the law, is seeking to keep out and send away Chinese persons who are not authorized to enter or remain, especially laborers, and the well-known fact of the matter is that the large majority of

cases are those of laborers masquerading under the merchant character or claiming the sacred right of citizenship. It is an essential part of the exclusion and deportation scheme that when a Chinaman has been ordered to be deported he shall not be allowed to go at large pending the time while the order is being carried out. Thus the laws presently to be cited provide, and their undoubted import is, that the Government shall retain custody of the Chinaman during the whole intervening period, however long the delays caused by efforts on the part of the Chinese to postpone the execution of the order, to pursue appeals, and to invoke *habeas corpus*. The Government can not delay this matter; the mandate of the law is that the marshal shall execute the order of deportation with all convenient dispatch (section 2, act of November 3, 1893). In fine, the legal scheme necessarily means that no opportunity of escape is to be allowed, and that the penalty under such bonds as are accepted, and, indeed, under any bonds which might be exacted, is not to be regarded as the price of permitting a defaulting principal to make his escape good, and (because of the practical immunity of an escape to Chinese quarters and conditions) to remain in this country.

As noted above, it happens that in these particular cases the remedy sought was by direct appeal from the district court to this court, and not by the interjection of *habeas corpus* while the Chinaman was *en route* to the port of shipment under the order of deportation. But the same questions are involved in cases now

before the court, or on the way to the court, in which the writ of *habeas corpus* was invoked. The case of Lee Yen Tai before the court on certificate is one of this nature, as is also the case of Liu Tsz Tsin. In the latter case there was an order of deportation signed by the United States district judge for the district of Vermont. While the Chinaman was in the custody of the United States marshal at the port of shipment, New York, a writ of *habeas corpus* was sued out, and on hearing before the United States district judge in the latter district the writ was dismissed and the petitioner remanded, and an appeal to this court from the order dismissing the writ was allowed by the district judge. In the same case the same procedure had previously been followed and an appeal allowed to the circuit court of appeals; this earlier appeal was afterwards withdrawn. The appeal to this court has not yet been perfected.

It is also true that both of the cases now before the court involve the claim of citizenship; but the Government understands that other cases are on the way, in which the claim advanced by the Chinamen, but denied by the lower tribunals, was that of merchant character. We contend that the principles forbidding the allowance of bail apply throughout the whole situation, to appeals in the usual course as well as to *habeas corpus* proceedings; and that the latter proceedings only illustrate more forcibly the perversions or errors on the subject and the undue delays imposed upon the orderly execution of the laws. It may be true that the

sacredness of the writ of *habeas corpus* and the sacredness of the claim of citizenship would properly lead the courts to exercise their discretion liberally, and take such cases out of the usual course of Chinese cases, where they would not so act respecting the merchant claim. The case of Li Sing, *ante*, was, however, one of *habeas corpus* on behalf of an alleged returning merchant. Such prepossessions perhaps explain the increase in the number of the "native born" claims. In effect, another appeal is thus more certainly obtained.

But however such points may appear to be on the merits—in respect to bail, just as the proper rules on that subject should apply in the case of regular appeals, as in the case of a review by *habeas corpus* and appeal thereon, so they should apply whether the claim of merchant character or of native-born citizenship is made. The right of citizenship is sacred from the point of view of denouncing and preventing its abuse quite as fully and clearly as from the point of view of extending it as a shield over those who justly and honestly claim it. To assert that right under circumstances and in cases in which it is often fraudulently asserted is not to make the title. It may be proper, because of its character, to bring it before the courts for ultimate determination on the merits, and it is conceded that the executive officers at the seaport or the frontier can not determine it conclusively, because the authority of their decision as final is restricted to the case of aliens; yet no reason is

perceived why in the first instance the immigration officers may not pass upon this question as they constantly do in practice, whereupon alleged citizens, who are excluded, in many cases sue out *habeas corpus*. But there is no such limitation to alienage in the jurisdiction of the United States justice, judge, or commissioner. He is entitled to pass upon the question of citizenship, and even in respect to that important question he must be satisfied by affirmative proof that the Chinaman is entitled to be and remain here; and if he finds to the contrary, as in these cases, reasons may quite probably be urged on the merits by opposing counsel why his conclusion should not be regarded as final, along with the argument that the commissioner has no jurisdiction. But in any event a prima facie case has been made out against the Chinaman, and an order of deportation has been legally entered, just as much in the case of the citizen claim as in the case of the merchant claim. Therefore we say that the same considerations respecting the admission to bail apply to the one case as to the other, and those considerations are operative throughout the whole extent of the controversy.

Furthermore, it happens that in these cases the appeals to this court are by the Chinamen. In case the Government were appealing and an order admitting to bail were entered, we believe that the contention that this step was unwarranted would justly apply, the principle involved covering review on appeal by either party. But certainly less merit

exists in the contention of the Chinese persons as to bail, when it is they who take the appeal and who are not satisfied to rest upon the result of the only appeal which the law expressly allows them. The hearing and decision on the merits will determine whether there is anything substantial in the propositions upon which further appeal to this court is based.

It is further to be observed that the main argument on the merits in these cases is not that Chinese persons who are citizens of the United States must of necessity be allowed to remain here, but that no alien Chinese persons, with few exceptions, can now be deported. There is a confession and avoidance here which is very significant, and this significance affects the equity as well as the legality of the claim to enter bail. If the discretion of a judge were untrammelled (as we contend below that it is not), the real ground of the Chinamen's case, viz, that the treaty of 1894 permits Chinese aliens, formerly subject to deportation, now to remain here, might well incline the judge's discretion to repudiate the notion of the right claimed on the ground of citizenship as disingenuous and lacking in *bona fides*.

II.

General laws on the question of bail which do not apply, and special laws which control the point.

The matter of admission to bail is, in general, committed to the sound discretion of a judge, unless some restraint has been imposed upon the exercise of discretion. None of the sections of the Revised Statutes

referred to in the index under the caption "Bail" affect this case. The case is not a criminal case, and therefore is not covered by sections 1014 and 1015; and if, in their anomalous character as quasicriminal, such causes should nevertheless be regarded as among the civil causes in which, by section 945, a certain scope of authority is given to United States judges and commissioners to take bail, that statute must be held to be governed by the exclusive laws on the subject of bail in Chinese cases as, indeed, must all general and earlier laws on the subject of bail. Section 1014 brings into the subject the general rule of guidance in matters of practice in Federal cases according to the practice and process in a particular locality. But we contend that no analogies exist between the rules as to taking bail in various civil proceedings under many State laws and this particular proceeding in Chinese cases, which in its nature and incidents is *sui generis*. Such State laws allowing admission to bail as of right, or in the discretion of the courts, are applied definitely, and we think exclusively, to certain specific forms of action, and can not be made to embrace the cases now before the court. We submit that there is no express statute, and not even any generally established practice, from which it can be implied that authority exists to admit to bail in cases arising under the Chinese exclusion laws. The laws which authorize admission to bail upon isssing of an order of arrest in a civil action, or in any other proceeding civil in its nature, are explicit, definite, and limited, and have no application whatever to the present proceedings.

But it may truly be said that these Chinese persons have committed an offense against the United States, even if they have not committed a crime, and that while the word "offense" in section 1014 is to be construed by the associated word "crime" it fairly enough includes these proceedings, which are at least quasi-criminal; and it may thereupon be urged that it seems a total perversion of law as well as justice to say that bail may be taken almost as matter of course in all criminal cases which are not capital, and yet must be refused in this merely technical offense, not involving a high degree of moral turpitude. Our reply to that position is that the Chinese exclusion laws have expressly controlled this matter and left no scope for a court's discretion or for the application of general notions of ethics and equity. We do not admit, of course, that such notions in this proceeding would be well founded.

Section 5 of the act of May 5, 1892, provides that "after the passage of this act, on an application to any judge or court of the United States in the first instance for a writ of habeas corpus by a Chinese person seeking to land in the United States to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay."

This does not apply to the case of Chinese persons found within the country; but the reason and purpose of that provision are manifest, and are consistent with the comprehensive intention of Congress manifested

throughout the laws, strictly to prevent unauthorized Chinese persons from getting into the country or remaining therein. It illustrates, or rather manifests, the resolution to take no risk of escapes after the entry of bail, and led to the next logical step contained in a paragraph of section 2 of the act of November 3, 1893, namely:

> Such order of deportation shall be executed by the United States marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States marshal, and shall not be admitted to bail.

Now, because the act of 1893 in its first section expressly amended section 6 of the act of 1892, which required the registration of laborers and permitted the registration of other Chinese persons having a right to remain in the United States, opposing counsel argued below in the Lee Yen Tai case, and will probably argue here, that the words "such order" in section 2 of the act of 1893 restrict the prohibition of bail to cases in which a nonregistered laborer is ordered to be deported. That contention is evidently not well founded. The Chinese-exclusion laws are all to be read together; they are regarded as a connected scheme. The act of 1893 shows by its title that it was passed to amend the act of 1892, and the act of 1892 continued in force for ten years all of the existing Chinese-exclusion laws. Section 12 of the act of 1884

and section 2 of the act of 1892 provide for the deportation of *any* Chinese person or person of Chinese descent who is convicted and adjudged under any of said laws to be not lawfully entitled to be and remain in the United States. Section 2 of the act of 1893 deals with other branches of the subject than the registration of laborers, and, therefore, where the words "such order of deportation" are used, they refer to any order of deportation of a Chinese person, and not only to an order of deportation of a nonregistered laborer.

Furthermore, whether or not it would be a proper and worthy act for this Government to provide now for another registration of all Chinese in this country, in order to validate the residence here of those who were not here or were not registered under the acts of 1892 and 1893, it is perfectly clear that the registration of 1892–93 was in order to provide a check by which those laborers who were in the country and were allowed to remain here might be distinguished from the numerous laborers who thereafter entered clandestinely against the prohibition of the laws. Consequently, in the deportation in this case, in which the commissioner's finding was that these men were Chinese laborers and not native-born citizens (and manifestly, as they were claiming to be native-born citizens, they were not laborers duly registered), their cases fall under the strictest view of the paragraph of the act of 1893 prohibiting the taking of bail. These orders of deportation were such orders of deportation as the act meant, in any case,

since these men were in fact Chinese laborers who were not registered. Either they were here when the time for registration under these acts expired, or they were not. If they were here, then their failure to register condemns them, and they clearly should go out as nonregistered laborers. If they were not here, then they must have come since the time limit of registration expired, and the fact that it is incongruous now to expect them to register when they were not here in time to do so has nothing to do with the controversy. That is one of the ways in which the United States protects itself. They are nonregistered laborers just the same, and it is far more incongruous with the situation that, being laborers, they should come here and be found here at all against the prohibition of the many provisions of law directed against them. Laborers can not come here at all, both by force of the treaty and the statutes.

We contend, then, that in all such cases the admission to bail is not only not warranted under general laws and upon the usual committal of that subject to the sound discretion of a judge, but is absolutely prohibited by these special laws which govern the matter.

This contention also affects the principles respecting the operation of an appeal as supersedeas. The supersedeas specifically granted in this case may operate duly and with ordinary effect even if it is not permitted to justify or sustain the application for bail.

So far as similar proceedings on *habeas corpus* (and appeals thereon) may be considered in connection with

these appeals, we have only to submit with respect that the statutes, including sections 763–765, Revised Statutes, and the rules of this court (No. 34, paragraphs 2 and 3), adopted long before the enactment of the laws of 1892 and 1893, must be held to be affected and limited *pro tanto* by the evident intent and scope of the prohibition of bail in Chinese cases.

It has not seemed necessary to us to lengthen this motion and brief by the citation of authorities. The general propositions which we submit are perfectly plain and well understood, and rest upon established decisions of this court rendered in recent years; and in reference to the particular point about bail it seems sufficient to submit the question to the court, with the statements of this paragraph regarding the laws and principles, and not to state at length the conflicting decisions and inconsistent practice followed upon the subject in the lower Federal courts. It may be that in many cases of this nature bail has been allowed, as in many other cases it has been refused. Various considerations of special hardships or special equities, as well as differing opinions on the law of the subject, have probably influenced (as they might naturally influence) the action of the courts. It is evident that neither the practice nor the law is looked upon as settled and conclusive, even by judges who take a liberal view of the matter, as is shown by the language of Judge Brown in the case of *United States* v. *Du Shen Tau et al.*, not reported apparently, but likely to be quoted *in extenso* by opposing counsel. We have in

mind two cases (*United States* v. *Pin Kwan*, 100 Fed. Rep., 609; *United States* v. *Ping Yik*, id., 1006), cited, we think, in some of opposing counsel's arguments in the courts below, in which the legal officers of the Government did not strenuously resist the admission to bail, not only because there the appeal was by the Government (which, indeed, standing alone, would not be a sound reason either in law or administrative practice, as indicated *supra*), but also because it was the misfortune of the Chinamen in those cases to have had their right to be and remain in this country justly challenged under the law, after they had, through errors for which they were not responsible, been admitted to the country upon their due application to the immigration authorities. These facts and the importance of the issues in those cases, pursuing a delayed course of appeal, led the Government not to insist on raising the point about bail therein.

We refer to those proceedings merely to illustrate how this question has passed along without conclusive determination. It is now before this court for final settlement. The present cases are typical and present fairly to the court, both from the point of view of the Government and of the Chinamen, a situation in which the legal rule may be defined and declared without embarrassment from other extraneous and accidental considerations.

Many of the authorities which opposing counsel seem to have cited in the courts below relate to the point as it stood before the acts of 1892 and 1893

were passed. Their own showing merely goes to prove that some judges have construed their authority and discretion in the matter in a liberal way.

But there are authorities holding to the strict view. We cite one which is typical: In *In re Chin Yuen Sing* (65 Fed. Rep., 788), Judge Lacombe used the following language:

> It is unnecessary to decide the question argued upon this application, viz, whether or not this court is expressly forbidden by statute from releasing on bail pending appeal, where the relator is a Chinese immigrant. Concededly there is such a prohibition where the application is being considered by the court in the first instance. (Act May 5, 1892, sec. 5.) That being so, it would be a singular exercise of discretion which would release an immigrant on bail after the court has decided that he should not be permitted to enter the country, when the statutes require that he shall not be released on bail before the court has so decided, and when there is still a possibility that its decision might be favorable to him. Application denied.

That happened to be a case where the Chinaman was not found in the country, but was seeking to land, and his application was denied by the collector of the port. For that reason it was not necessary for Judge Lacombe to consider the question of bail on such appeals as these, or on any appeal at all, as the proceeding before him was of first instance. But the

force of his argument is very weighty in this controversy, and is applicable with equal effect to the present cases under the act of 1893, which includes, as we think we have shown, all cases of deportation.

Opposing counsel may possibly state that the records of the United States circuit court and of the United States attorney's office show that subsequently Judge Lacombe decided the question of his power and discretion by admitting the defendant to bail pending the appeal. We have no knowedge of these facts; but assuming them to be true, the only remark to be made is that the learned judge construed the reserved point erroneously. The subject is now before this court for settlement and for the correction of such errors as have been committed and followed.

We think we have stated the reasons why the doctrine of this court, announced in the case of *Hudson* v. *Parker* (156 U. S., 277, 285)—regarding the right of persons charged with crime to be admitted to bail not only after arrest and before trial, but after conviction and pending a writ of error—does not apply to such appeals as these nor to *habeas corpus* cases and appeals, on orders of deportation of Chinese persons.

These reasons show why a broad claim of right, sacred indeed when it is well founded, may justify the taking of bail in a criminal case, and yet not justify taking it in these peculiar cases, either upon a regular appeal or upon appeal following *habeas corpus*.

We respectfully submit that this motion should be granted and an order entered vacating so much of the

orders of Mr. Justice Peckham of October 1, 1901, as admits these Chinese persons to bail.

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